Subject Index

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutory provisions involved	3
Statement of the case	3
Argument	4
I. Introduction: Basic objection to decision	4
II. The decision of the court below demands that the employer apply a standard in determining how to deal with dissident minority employees that is impossible to apply in practice	5
III. The decision of the court below requires the employer to bargain with dissident minority employee groups and individuals, although no machinery exists for determining the appropriate bargaining unit or for designating bargaining representatives	7
IV. The decision of the court below undermines established grievance procedures as a means of eliminating discrimination	10
V. The decision of the court below is based on an erroneous assumption that the union was free to bargain on the subject of discrimination during the term of the governing collective bargaining contract	11
VI. The conduct of the dissenting minority employees was not protected in that it constituted coercion of the employer in the designation of the employer's bargaining representative	13
VII. The decision of the court below will require the employer to make contractual promises to dissenting minority employees inconsistent with the employer's obligations under the governing union contract	14
Conclusion	16

Table of Authorities Cited

Cases	Pages
Moore v. Sunbeam Corp., 459 F. 2d 811 (7th Cir., 1972) ..	16
N.L.R.B. v. Tanner Motor Livery, Ltd., 349 F. 2d 1 (9th Cir., 1964) and 419 F. 2d 216 (9th Cir. 1969)	16

Statutes

Civil Rights Act of 1964, 42 USC §§ 2000e-3(a)	passim
Labor Management Relations Act:	
Section 2(5) (29 USC 152(5))	13
Section 7 (29 USC 157)	3, 10
Section 8(b)(1) (29 USC 158(b)(1))	13
Section 9 (29 USC 159)	3, 5, 15

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-696

THE EMPORIUM CAPWELL CO.,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF FOR PETITIONER THE EMPORIUM CAPWELL CO.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia (Pet. App. 1-53) is reported at 485 F.2d 917.

The decisions of the National Labor Relations Board (Pet. App. 54-77) and of the Trial Examiner (Pet. App. 78-106) are reported at 192 N.L.R.B. No. 19.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1973. The time for filing this Petition for Certiorari was extended to October 27, 1973, and the Petition was timely filed. The Petition was granted on February 19, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it is an unfair labor practice for an employer to discharge employees who, during good faith efforts by their union to eliminate alleged racially discriminatory employment practices through the grievance and arbitration procedures of the collective bargaining contract, insisted that the company bargain directly with them to eliminate those practices and, upon the company's refusal to do so, picketed the company and urged customers to boycott it.

STATUTORY PROVISIONS INVOLVED

Sections 7 and 9(a) of the Labor Management Relations Act (LMRA) are fully set out in the Petition for Certiorari, App. 108.

The pertinent section of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) is set out fully in the Petition for Certiorari, App. 109-110.

STATEMENT OF THE CASE

In 1968 several department store employees complained to their union, Department Store Employees' Union, Local No. 1100, R.C.I.A., of alleged racial discrimination by their employer, The Emporium Capwell Co., the Petitioner here. The contract prohibited such discrimination. The union agreed to, and did, investigate and prosecute their grievances.

Two of the employees disrupted the ensuing adjustment board proceedings where the union was presenting evidence in support of their individual charges of discrimination. The employees had been urged by representatives of the Equal Employment Opportunity Commission of the United States (EEOC) and the California Fair Employment Practices Commission (FEPC) to pursue the contractual grievance procedures. There was no evidence that their grievances were not being vigorously processed on an individual basis. Nevertheless, they refused to give testimony, walked out of the hearing, and as self-appointed representatives of all minorities demanded

to bargain with the president of the Emporium on a group basis. They held a press conference and engaged in picketing and handbilling, using vituperative language throughout, referring to slave conditions at the Emporium and characterizing the employer as a racist pig. Continuing their activities after two warnings, the employees were terminated.

The Trial Examiner and the NLRB held that the activities were not protected by the Labor Management Relations Act. The Court of Appeals reversed on the grounds that the policy set forth in Title VII of the Civil Rights Act of 1964 modified the doctrine of exclusivity embodied in the LMRA. Thus, the Court read Title VII as giving racial minorities special rights, transcending the usual exclusive representation rights of the majority representative.

On remand the Court of Appeals would have the Board consider two questions as determinative of whether the employees' activities were protected by the LMRA: (a) ". . . whether the union was actually remedying the discrimination to the fullest extent possible by the most expedient and efficacious means" and (b) whether the conduct of the employees was so "disloyal" as to justify the discharges.

ARGUMENT

I. INTRODUCTION: BASIC OBJECTION TO DECISION

We agree completely with the statements and arguments made by the Board in its Petition for Certio-

rari and for that reason will not repeat them here but will summarize our position on the principal points argued by the Board by saying as follows:

It is true that Title VII forbids discrimination and also true that it forbids discharging an employee who is seeking to receive its protection.

But this cannot be interpreted to require a partial repeal of Section 9 of the Labor Management Relations Act by saying that the representative chosen by the majority of employees shall be the exclusive representative of all the employees in the unit *except* where minority employees are protesting discrimination and the union is not proceeding in the most expedient and efficacious manner.

Such interpretation is unjustified. If concerted activities were the only way open to combat discrimination there might be a basis for the decision. But Section 9 in no way prevents minority employees from combatting discrimination through the remedies provided by statute. Therefore, there is no need to "reconcile" the two statutes or to suspend the specific language of one statute because of the broad declarations of policy in the other.

II. THE DECISION OF THE COURT BELOW DEMANDS THAT THE EMPLOYER APPLY A STANDARD IN DETERMINING HOW TO DEAL WITH DISSIDENT MINORITY EMPLOYEES THAT IS IMPOSSIBLE TO APPLY IN PRACTICE.

The Board argues that the decision by the Court of Appeals requires it to apply a standard that would

be virtually impossible to administer. That standard is as follows: ". . . whether the union was actually remedying the discrimination to the fullest extent possible by the most expedient and efficacious means." (Pet. App. 28) The Board notes that it would be required to substitute its judgment for that of the union, and that extremely sensitive and delicate considerations of grievance processing are involved which are simply not susceptible to evaluation under the Court of Appeals' standard.

What is true for the Board is doubly true for employers. When an employer is confronted by a minority picket line and other coercive activities, it must endure the economic coercion or bargain with the minority group, unless it determines that the union is meeting that high standard. Unlike the Board, which is a judicial body, the employer has no machinery or conceivable way of determining whether the union is proceeding in the best possible way. And, unlike the Board, it must make its determination immediately and not after extended litigation and consideration.

The unreasonableness of such rule is demonstrated by the following:

First, the employer has no right to inquire into the internal workings of the union in adjusting the conflicting demands among the groups or individuals that the union may represent. Second, the employer is essentially in an adversary position with the union and cannot substitute its judgment for that of the union nor expect cooperation from the union in evalu-

ating union conduct. Third, the employer has a statutory duty to bargain with the properly established bargaining representative, and to bargain with no other. Any inquiry into, or decision by the employer as to whether the union met the Court's "most expedient and efficacious means" standard would be suspect and potentially in conflict with the employer's statutory duty to bargain exclusively with the established representative.

III. THE DECISION OF THE COURT BELOW REQUIRES THE EMPLOYER TO BARGAIN WITH DISSIDENT MINORITY EMPLOYEE GROUPS AND INDIVIDUALS, ALTHOUGH NO MACHINERY EXISTS FOR DETERMINING THE APPROPRIATE BARGAINING UNIT OR FOR DESIGNATING BARGAINING REPRESENTATIVES.

The Board's petition for certiorari pointed out that "[t]he court below did not disturb the Board's finding that the concerted activities here involved 'nothing short of a *demand that* [*the Company*] *bargain with the picketing employees* for the *entire group of minority employees.*'" (Pet. 73-830, p. 14.) (Emphasis added.)

The Court below held that the picketing was protected if the union did not do its job in the most expedient and efficacious manner.

Since the object of the picketing was to compel the employer to bargain, the corollary to this is that under the decision the employer was required to bargain with the picketing employees.

The problems arising out of such decision are set forth briefly below.

First, there is no machinery for determining the appropriate bargaining unit. From their statements it appears that Hawkins and Hollins wanted to represent only minority employees but they wanted to represent all of them: Black, Yellow, Red and Brown.

Hawkins testified as follows:

> "Q. Were you asking the union to appear before the San Francisco Council on behalf of all Brown, Red, Yellow, people?
>
> "A. *We* were trying to represent them." (Transcript before Trial Examiner, p. 55; App. 33.) (Emphasis added.)

See also Transcript before Trial Examiner, p. 37, App. 22. What if two Yellow or two Brown employees also demanded that the employer deal with them on behalf of all minority employees? Suppose that they wanted to represent only their own race or color? How could the employer possibly decide which unit of employees should be used as the basis of bargaining?

If the employer were to take the position that the storewide unit was the established and only appropriate unit but the minority representatives disclaimed any interest in representing anyone other than minority employees or anyone other than their own color, the law provides no machinery for determining the appropriate unit so that the employer could engage in bargaining with any degree of certainty.

Second, there is no machinery for designating the bargaining representative in such cases. The Trial Examiner said:

> "What we have here is a group of four employees who set out on their own to rectify what they in good faith considered working conditions unfair to minority employees. Apparently, *they were self-appointed* for there is *no evidence that they were elected or in any way designated* by minority employees generally to represent them, they alone walked out of the September 3 meeting and it does not appear that they were joined in their picketing activities by other Emporium employees." (Pet. App. 101-102.) (Emphasis added.)

On these facts how can the employer possibly determine who, if anyone, other than the union, has authority to bargain for the minority employees?

We can hardly believe that the decision below requires the employer to bargain simultaneously with any and all minority employees or groups of minority employees who wish to correct alleged discrimination.

Yet the decision below declares that the picketing was protected and therefore that the employer must bargain with someone, without saying who that someone should be.

The absence of any statutory remedy for determining the appropriate unit or ascertaining what representatives have been chosen to represent the employees in such unit is clear proof that the statute was never intended to be interpreted and applied in this way.

IV. THE DECISION OF THE COURT BELOW UNDERMINES ESTABLISHED GRIEVANCE PROCEDURES AS A MEANS OF ELIMINATING DISCRIMINATION.

The Court below said:

> "We cannot agree that any inconvenience which the Company might experience *in being required to bargain with the minority here while still participating in the grievance procedures* justifies withdrawing Section 7 protection from these concerted activities." (Pet. App. 29.) (Emphasis added.)

This declaration requires the employer to proceed on two fronts simultaneously; that is: to bargain with the minority and to litigate with the union respecting the same subject matter. Entirely different rules govern these two types of proceedings and they will inevitably have entirely different results.

No provision whatever is made for the contingency that the Arbitrator might decide wholly or partially in favor of the employer and declare that the grievants have failed to prove in whole or in part that the employer was guilty of any discrimination.

Moreover, the statement above quoted ignores the fact, as found by the Court, that: "[i]n abandoning the grievance procedures and *seeking to bargain on their own,* the picketers have rendered *essentially ineffective* the method of remedying grievances chosen by their collective bargaining representative and provided by the collective bargaining agreement." (Pet. App. 24.) (Emphasis added.)

These results are so greatly at variance with established representation and bargaining procedures as to demonstrate that the decision is contrary to law.

V. THE DECISION OF THE COURT BELOW IS BASED ON AN ERRONEOUS ASSUMPTION THAT THE UNION WAS FREE TO BARGAIN ON THE SUBJECT OF DISCRIMINATION DURING THE TERM OF THE GOVERNING COLLECTIVE BARGAINING CONTRACT.

The Court below ignored the fact that the demand for bargaining took place in the middle of a contract year. (GC-2, Section 38A, App. 103.) In fact it suggested that the union might bargain rather than pursue the grievance procedures specified in the contract, saying as follows:

> "For example, the union might be vigorously processing individual grievances before an adjustment board, *while it would be more efficient and thus preferable for it to be attempting to engage in collective bargaining negotiations with the employer* for all minorities to eliminate all the discriminatory employment practices." (Pet. App. 28.) (Emphasis added.)

This undermines if it does not destroy the stability of a labor contract.

This statement by the Court did not apply to bargaining on a subject not covered by a contract. The subject of discrimination had already been considered in collective bargaining and resulted in a contract provision forbidding discrimination. (GC-2, Section 21E; App. 101.) If there were any violations of this

agreement the parties agreed that these should be handled through the grievance and arbitration machinery set up in the contract. (GC-2, Section 5B, App. 100-101.) Hollins and Hawkins were bound by this agreement as were all other members of the bargaining unit.

The Court below gave no explanation whatever as to how either the union or Hawkins and Hollins could compel the employer to bargain a second time on a subject already agreed upon and included in a contract, particularly in view of the fact that the contract had a so-called "zipper clause" reading:

> "The parties hereto agree that all issues between them are settled by this agreement for the full term thereof excepting those reopenable issues hereinabove specified [wages, vision care benefits and pension benefits]." (GC-2, Section 38C, App. 103.)

Nothing in Title VII requires or justifies such a result. The decision makes both the contract and the "zipper clause" meaningless not just in those situations involving actual discrimination but wherever any minority employee happens to believe that there has been discrimination.

VI. THE CONDUCT OF THE DISSENTING MINORITY EMPLOYEES WAS NOT PROTECTED IN THAT IT CONSTITUTED COERCION OF THE EMPLOYER IN THE DESIGNATION OF THE EMPLOYER'S BARGAINING REPRESENTATIVE.

Hawkins and Hollins picketed the employer to compel the employer to bargain with them but, as Hollins declared at the Adjustment Board, they "wanted to talk to the President of the Emporium and wouldn't talk to anybody else." (Pet. App. 7.) And they refused to talk to the company's personnel director when requested to do so by the company president. (Pet. App. 8.)

Section 8(b)(1) of the Labor Management Relations Act makes it an unfair labor practice for a labor organization to restrain or coerce an employer in the selection of his collective bargaining representative.

Section 2(5) of the Labor Management Relations Act reads as follows:

> "The term 'labor organization' means any organization of any kind, or any agency or *employee representation committee* or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." (Emphasis added).

We think that Hawkins and Hollins were a labor organization as defined in the Act.

If so, their conduct was an unfair labor practice and cannot constitute protected activity.

If Hawkins and Hollins were not a labor organization we have the bewildering result that the employer is legally compelled to engage in collective bargaining with employee representatives who are not a labor organization and have no recognized status under the Labor Management Relations Act.

Nothing in Title VII requires or justifies such result.

VII. THE DECISION OF THE COURT BELOW WILL REQUIRE THE EMPLOYER TO MAKE CONTRACTUAL PROMISES TO DISSENTING MINORITY EMPLOYEES INCONSISTENT WITH THE EMPLOYER'S OBLIGATIONS UNDER THE GOVERNING UNION CONTRACT.

If the employer is legally obligated to bargain with minority employees it follows that when an agreement is reached the agreement should be reduced to writing and signed.

As the dissenting opinion below pointed out, whatever agreement proves to the advantage of the minority groups inevitably is to some extent to the disadvantage of the majority. Thus we may have two contracts in conflict with each other.

It was found that the record contains no evidence of any discrimination by the employer. In fact the General Counsel disavowed any intent of proving actual discrimination by the employer. (Pet. App. 90-91.)

In bargaining the victory often goes to the side which is stronger rather than the side which is right.

In order to avoid loss from picketing by minority employees who mistakenly but in good faith believe him guilty of discrimination, an innocent employer may actually settle with them by engaging in a reverse form of discrimination favoring minorities at the expense of the majority.

A valid contract cannot be scrapped simply because a couple of minority employees believe in good faith that the employer is guilty of discrimination. Consequently, a contract negotiated with self-appointed minority representatives cannot supersede a contract between the employer and the representative of the employees designated as provided in Section 9 of the Labor Management Relations Act.

On the contrary it must give way where it is in conflict, and therefore the bargaining with the minority becomes meaningless.

If on the other hand the employer has concluded that the minority demands were unlawful and that he could not lawfully agree to them, the law gives him no plain, speedy or adequate protection. It would take nearly a year to secure a Board decision that the minority employees were guilty of a refusal to bargain. The Board is not authorized to enjoin the picketing and boycotting pending a Board hearing.

The manifest injustice of this result is plain proof that Title VII never intended it.

CONCLUSION

In addition to the basic argument advanced by the Board, we have pointed out some of the incongruities resulting from the decision below.

There is nothing in Title VII justifying the conclusion that the general policies in that statute were intended to repeal the specific provisions of Section 9 of the Labor Management Relations Act and thereby produce results as unjust and undesirable as outlined above.

We believe that the opinions of the Seventh Circuit in *Moore v. Sunbeam Corporation,* 459 F.2d 811 (1972), and of the Ninth Circuit in *N.L.R.B. v. Tanner Motor Livery, Ltd.,* 349 F.2d 1 (1964) and 419 F.2d 216 (1969), are correct and should be followed and that the decision below should be reversed.

Respectfully submitted,

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May, 1974.